POH SWEE HOON (F)

v.

SYARIKAT TANAHRUMAH SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' DR. ZAKARIA M. YATIM J.
[CIVIL SUIT NO. C1868 OF 1983]
19 OCTOBER 1990

APPEAL : Application for extension of time to file notice of appeal - Notice not filed due to negligence of solicitors - Whether sufficient reason to exercise discretion to enlarge time.

The defendant applied for an extension of time to file a notice of appeal against the decision of the Senior Assistant Registrar who entered judgment for the plaintiff. The notice of appeal was not filed in time due to the mistake of a secretary of the firm of solicitors acting for the defendant. The question that arose was whether this constituted sufficient grounds for granting extension of time to file the notice of appeal.

Held:

[1] In considering the application the Court has the discretion whether or not to grant extension of time and the discretion must be exercised judicially.

[2] The mistake of the appellant's solicitors by itself did not constitute a sufficient ground for the exercise of the discretion to grant extension of time to file the notice of appeal.

[Application for extension of time dismissed with costs].

[Ed. Note: This judgment although dated 19 October 1990 was only received by us recently].

Cases referred to:

Tan Ken Mee v. Lim Sooi Jim [1981] 1 MLJ 271 @ 272 ***(refd)***

Ratnam v. Cumarasamy & Anor. [1965] 31 MLJ 228 ***(refd)***

Schafer v. Blyth [1920] 3 KB 140 ***(not foll)***

Gatti v. Shoosmith [1939] 3 All ER 916 ***(not foll)***

Palata Investments Ltd. & Ors. v. Burt & Sinfield Ltd. & Ors. [1985] 2 All ER 517 ***(not foll)***

Tractors Malaysia Bhd. v. Southern Estates Sdn. Bhd.[1984] 1 CLJ 154/ [1984] 1 MLJ 118 ***(foll)***

Gan Hay Chong v. Siew Kian Yuh & Anor. [1975] 2 MLJ 129 ***(foll)***

Hoe Joe Sawmills v. Sigmes (Air-Conditioning) Sdn. Bhd. [1979] 2 MLJ 236 ***(foll)***
Asia Commercial Finance (M) Bhd. v. Pasadena Properties Development & Ors. [1990] 2 CLJ 961 ***(foll)***

For the plaintiff - Khaw Chay Tee; M/s. Allen & Gledhill
For the defendant - William Jee Kee Leong; M/s. Joesph Tan & Tang

JUDGMENT

Dr. Zakaria M. Yatim J:
This is an application by the defendant by summons-in-chambers for an order that the defendant be granted an extension of time to file a notice of appeal to Judge in chambers against the decision of the Senior Assistant Registrar given on 14 February 1985. On that date, the Senior Assistant Registrar allowed the plaintiff to enter final judgment against the defendant in the sum of RM917,888.13 and costs.

After hearing the application in chambers, I made an order allowing the application with costs. At the request of the plaintiff I adjourned the matter into open Court for further argument.

In his affidavit in support of the application, Mr. William Leong Jee Keen, an advocate and solicitor averred that the defendant gave instructions to appeal against the decision of the Senior Assistant Registrar. He instructed his secretary to type the notice of appeal and to prepare the form of praecipe for filing at the Court Registry on 15 February 1985. On that day, the deponent had an outstation matter and left word with his secretary to finalise the notice of appeal and to file the same at the Court Registry immediately. The office file relating to the appeal was brought to his attention one day before the present application was made and he found that his secretary had failed to attend to the said matters. He asked his secretary why she did not attend to the matter within the stipulated time and her reply was that she was not feeling well during that time and had forgotten about the matter. According to the deponent, on 14 February 1985, he had informed the solicitors for the plaintiff orally that the defendant's appeal to the Judge in chambers against the decision of the Senior Assistant Registrar would be filed and he verily believed that leave to extend time to file the appeal would not in any way prejudice the plaintiff.

It is clear from the affidavit of Mr. William Leong Jee Keen that the reason why the notice of appeal was not filed within the prescribed time was due to the negligence of the firm of solicitors acting for the defendant. In particular it was due to the mistake of Mr. William Leong Jee Keen's secretary.

In considering the application the Court has the discretion whether or not to grant extension of time and the discretion must be exercised judicially. *Tan Ken Mee v. Lim Sooi Jim* [1981] 1 MLJ 271 @ 272. In *Ratnam v. Cumarasamy & Anor.* [1965] 31 MLJ 228, an appeal from the decision of the Court of Appeal of the Supreme Court of the Federation of Malaya, the Privy Council at p. 229 said:

> The Rules of Court must *prima facie* be obeyed, and in order to justify a Court in extending the time during which some step in procedure requires to be taken there must be some material upon which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged and that his reason for this delay was that he hoped for a compromise. Their Lordships are satisfied that the Court of Appeal were entitled to take the view that this did not constitute material upon which they could exercise their discretion in favour of the appellant. In these circumstances their Lordships find it impossible to say that the discretion of the Court of Appeal was exercised upon any wrong principle.

In support of his application, Mr. William Leong Jee Kee, Counsel for the defendant, relied on an English decision in *Schafer v. Blyth* [1920] 3 KB 140. In that case the Court exercised its discretion and allowed the defendant to enlarge the time to enable him to make an application to set aside judgment in default of appearance. *Shafer's* case reflects the attitude of the English Court that although there had been a delay and the delay was due to the mistake of the solicitor, the English Court would

allow the extension of time. See *Gatti v. Shoosmith* [1939] 3 All ER 916 and *Palata Investments Ltd. & Ors. v. Burt & Sinfield Ltd. & Ors.* [1985] 2 All ER 517.

The stand taken by our Courts however, is different from that of the English Court.

In *Tractors Malaysia Bhd. v. Southern Estates Sdn. Bhd.* [1984] 1 MLJ 118, Mohamed Azmi FJ, as he then was, in delivering the judgment of the Federal Court said at p. 121:

> In the Federal Court we rule that mistake of appellants' solicitors on point of law by itself cannot constitute sufficient grounds for granting extension of time to file notice of appeal ...

In *Gan Hay Chong v. Siew Kian Yuh & Anor.* [1975] 2 MLJ 129, the Federal Court held that the mistake of the appellant's solicitors in that case did not constitute a sufficient ground for granting an extension of time. In *Hoe Joe Sawmills v. Sigmes (Air-Conditioning) Sdn. Bhd.* [1979] 2 MLJ 236, the reason given for the application for extension of time was the fault of the solicitors' clerk. The Federal Court decided that this was not a sufficient ground for granting special leave.

This Court is bound by the decisions of the Federal Court cited above. Although *Tractors Malaysia v. Southern Estates*, and *Gan Hay Chong v. Siew Kian Yuh* were concerned with applications for extension of time to file notice of appeal to the Federal Court, in my view the principles laid down in those cases apply to the present case. See my recent decision in *Asia Commercial Finance (M) Bhd. v. Pasadena Properties Development and 2 Ors.* [1990] 2 CLJ 961.

For the reasons stated above I set aside the order I made in chambers and order that the application be dismissed with costs.